

MAR 28 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARK ANTHONY SIMMONS,

Defendant - Appellant.

No. 07-10023

D.C. No. CR-04-02090-1-DCB

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Submitted March 18, 2008^{**}

Before: CANBY, T.G. NELSON, and BEA, Circuit Judges.

Mark Anthony Simmons appeals from the 300-month sentence imposed following his jury-trial conviction for conspiracy to possess with intent to

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Appellant's request for oral argument is denied.

distribute marijuana, possession with intent to distribute marijuana, and aiding and abetting, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(vii), (b)(1)(C) and 846.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Simmons contends that the district court erred in disregarding the jury's determination regarding the amount of marijuana attributable to him. This contention fails because the judge's quantity determination did not lead to a sentence above the statutory maximum. *See United States v. Toliver*, 351 F.3d 423, 432-33 (9th Cir. 2003).

Simmons also contends that the district court erred by find him an organizer or leader of the criminal scheme when the jury acquitted him of that conduct. It is well settled, however, that judges are permitted to consider acquitted conduct for sentencing purposes. *See United States v. Mercado*, 474 F.3d 654, 657-58 (9th Cir. 2007).

AFFIRMED.